International Union of Operating Engineers, Local No. 673 *and* Oliver B. Cannor & Son, Inc., of Florida and International Brotherhood of Painters and Allied Trades, Local Union 164. Case 12-CD-271

June 16, 1981

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Oliver B. Cannon & Son, Inc., of Florida, herein called the Employer, alleging that International Union of Operating Engineers, Local No. 673, herein called the Respondent or the Engineers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Brotherhood of Painters and Allied Trades, Local Union 164, herein called Painters or Local 164.

Pursuant to notice a hearing was held before Hearing Officer John C. Wooten on January 20, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Florida corporation, is a wholly-owned subsidiary of Oliver B. Cannon & Son, Inc., a Pennsylvania corporation, which is in turn a wholly-owned subsidiary of Philadelphia Suburban Corporation, a Delaware corporation. The Employer is party to a contract with Container Corporation of America (CCA) to perform certain renovation or rework construction at CCA's paper production facility at Fernandina Beach, Florida. The amount of the contract is $224,252. In the course of that contract, which will be performed in a 12-month period, the Employer will use paint, sand, and equipment, valued substantially in excess of $50,000, which paint, sand, and equipment, will be or has been shipped directly to the jobsite from points outside the State. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Engineers and the Painters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The work in dispute involves the servicing and operation of three Ingersoll-Rand air compressors (a 750 CFM, a 1050 CFM, and a 1200 CFM) incident to the Employer's sandblasting and repainting work at the Fernandina Beach, Florida, facility of the CCA, Papermill Division.

B. *Background and Facts of the Dispute*

The Employer has a contract with CCA to provide sandblast cleaning and repainting of certain buildings at CCA's paper production facility at Fernandina Beach, Florida. In repainting, old paint is removed by sandblasting and new paint is sprayed on the cleaned surface. The air compressors are used for both operations. The Employer, through its parent corporation, is party to a collective-bargaining agreement between District Council No. 21, Brotherhood of Painters and Allied Trades, and Associated Master Painters and Decorators of Philadelphia, Inc. Under that agreement, the Employer is bound to honor the "Working Agreement between Painters Local Union No. 164 and the Jacksonville Chapter, Painting and Decorating Contractors of America" when, as here, the Employer is working within the jurisdiction of Local 164. The Employer's employees, all of whom are represented by the Painters pursuant to the above-described agreements, perform the disputed work as an incident to their sandblasting and repainting work. The disputed work is not referred to in the contract. Supervisors may, on occasion, also perform the disputed work.

On November 17, 1980,[1] Nicholas Castellano, the Employer's project manager at the CCA site, spoke with a representative of the Engineers, who requested that the Employer assign an employee represented by the Engineers to operate the air compressors on the job. Castellano refused to do so. Around December 3, Castellano again spoke with the Engineers representative, who told him "I have my back against the wall. If you don't put an operator on the compressor, I will have to take

[1] All dates are in 1980, unless otherwise specified.

some sort of action."[2] The next day the Engineers established picket lines at the jobsite. Other crafts, including the Painters, refused to cross the picket line, and as a result work ceased on the entire job. McKenzie, a journeyman painter employed by the Employer and the Painters steward, was told by Acton that the strike would continue until an operating engineer was hired to run the compressors.

On the next scheduled working day, December 8, the picketing continued. On that day, the CCA project engineer directed the Employer to cease all work at the jobsite until the Employer could assure CCA that there would be no further work stoppage. Subsequently, the Engineers agreed to cease picketing pending Board resolution of the dispute, and on January 5, 1981, the Employer resumed work on the CCA contract with members of the Painters continuing to operate the compressors.

C. *The Contentions of the Parties*

The Employer contends the dispute is properly before the Board for determination, and that it has assigned the disputed work to its employees who are represented by the Painters, in accordance with its collective-bargaining agreements, industry practice, and for reasons of relative skills and economy and efficiency.

The Respondent asserts that no jurisdictional dispute exists because Local 164 has disclaimed the disputed work by virtue of an interunion agreement granting jurisdiction to the Respondent. In support of this contention, the Respondent introduced a memorandum of understanding dated April 22, which was purportedly reached by the International Unions of Local 164 and Local 673, in the Painters disclaimed the operation of compressors of 600 CFM or greater, together with of its business manager that this agreement consistently been honored during its term. agreement is signed by the business managers officials. The Respondent contends that has taken no action inconsistent with this disclaimer, and notes that the Painters picket line established by the Engineers site. The Respondent further contends agreed-upon method for resolution virtue of the dispute-resolution Employer-Painters collective The Respondent asserts to these agreements the Painters has international, it expressly assents to participate in and be bound by any proceedings that may be instituted. Alternatively, the Respondent contends that the work should be assigned to it based on the interunion agreement, relative skills, economy, and efficiency, and the employer and area practice.

Local 164 appeared at the hearing but has taken no position on the record. However, representatives of the Painters International testified, claimed the work as properly that of the Painters, and stated that under the International's constitution the Local 164 business manager was without authority to waive the Union's jurisdictional claims.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is clear that the Respondent engaged in picketing at the jobsite and that such picketing was to protest the Employer's assignment of the disputed work to its employees who are represented by the Painters. Accordingly, we find that reasonable cause exists to believe that the Respondent violated Section 8(b)(4)(D) of the Act.

We find no merit in the Respondent's contention that the Painters have disclaimed the *disputed* work by virtue of the memorandum of understanding. In this regard, we note that the Employer's employees, represented by the Painters, have continued to perform the work. The Board has long held that such disclaimers are ineffective where, as here, the employees represented by the disclaiming organization continued to perform the disputed work.[3]

Additionally, we find that there exists no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound. Whatever obligations the Internationals or Locals imposed upon themselves through the memorandum of understanding, there is no evidence that the Employer agreed to be bound by this agreement, and the Employer expressly denies any such obligation. With respect to the dispute-resolution clauses of the Employer-Painters collective-bargaining agreements, neither the Employer nor the Painters has instituted proceedings under them and, in any

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herwise deny that the

[3] See, e.g., *Bricklayers & Allied Craftsmen, Local Union No. 2 of California, Bricklayers and Allied Craftsmen, AFL-CIO (E. J. Harris Construction, Inc.)*, 254 NLRB No. 123 (1981); *International Brotherhood of Electrical Workers, Local No. 610 (Landau Outdoor Sign Company, Inc.)*, 2 NLRB 320 (1976).

event, the Engineers are not a party to the agreements and the Employer has indicated it would not assent to any such tripartite proceeding. Accordingly, we find that the Painters have not disclaimed the diputed work, there is no agreed-upon method for the voluntary adjustment of the dispute, and that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.

The following factors are relevant in making the determination of the dispute before us:

1. The Employer past practice

The record discloses that a jurisdictional distinction is made in the industry between "new construction" painting and "maintenance" or "rework" painting. The disputed work is "maintenance," and undisputed evidence shows that the Employer has uniformly assigned such work to its own employees represented by the Painters. Accordingly, this factor favors an award to the Painters.

2. Skills, economy, and efficiency

Members of both the Painters and the Engineers have operated compressors. The record discloses that the operation of the compressors is relatively simple, requiring filling it with fuel, water, and oil, pushing a button to turn it on, checking the water and oil levels periodically, and pushing a button to turn it off. It does not require full-time attention, and the Employer's employees can sandblast and paint and still tend the compressors as required. The Employer would have no work other than running the compressor for members of the Engineers. We therefore find that this factor favors an award to the Painters.

3. The Employer preference

The Employer has assigned the disputed work to its employees represented by the Painters and has expressed its preference that the disputed work be performed by these employees. The employer preference therefore favors an award to the Painters.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that employees represented by the Painters are entitled to perform the disputed work. In making this determination, we are awarding the work in question to employees who are represented by the Painters, but not to that Union or its members. The present determination is limited to the particular dispute which gave rise to this proceeding.[4]

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Oliver B. Cannon & Son, Inc., of Florida, who are represented by International Brotherhood of Painters and Allied Trades, Local Union 164, are entitled to operate the air compressors used in the Employer's sandblasting and repainting operations at the Fernandina Beach, Florida, facility of the Container Corporation of America, Papermill Division.

2. International Union of Operating Engineers, Local No. 673, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Oliver B. Cannon & Son, Inc., of Florida to assign the disputed work to employees represented t that labor organization.

3. Within 10 days from the date of this De and Detemination of Dispute, International of Operating Engineers, Local No. 673, shal the Regional Director for Region 12, in whether or not it will refrain from forcir quiring the Employer, by means proscrib tion 8(b)(4)(D) of the Act, to assign t work in a manner inconsistent with t termination.

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[4] We reject the Employer's request for a broa and similar work disputes arising between it ar Respondent's picketing was for a brief period, it with the Employer to allow work to continue parties submitted their dispute to the Bo cient to demonstrate that the Respond unlawful conduct in order to obtain these circumstances, we are unable pensable to the fashioning of a *Brotherhood of Electrical Worke Signal Co., Inc.*), 248 NLRB

some sort of action."[2] The next day the Engineers established picket lines at the jobsite. Other crafts, including the Painters, refused to cross the picket line, and as a result work ceased on the entire job. McKenzie, a journeyman painter employed by the Employer and the Painters steward, was told by Acton that the strike would continue until an operating engineer was hired to run the compressors.

On the next scheduled working day, December 8, the picketing continued. On that day, the CCA project engineer directed the Employer to cease all work at the jobsite until the Employer could assure CCA that there would be no further work stoppage. Subsequently, the Engineers agreed to cease picketing pending Board resolution of the dispute, and on January 5, 1981, the Employer resumed work on the CCA contract with members of the Painters continuing to operate the compressors.

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The Respondent asserts that no jurisdictional dispute exists because Local 164 has disclaimed the disputed work by virtue of an interunion agreement granting jurisdiction to the Respondent. In support of this contention, the Respondent introduced a memorandum of understanding dated April 22, 1971, which was purportedly reached by the International Unions of Local 164 and Local 673, in which the Painters disclaimed the operation of compressors of 600 CFM or greater, together with testimony of its business manager that this agreement has consistently been honored during its term. This agreement is signed by the business managers of both locals. The Respondent contends that Local 164 has taken no action inconsistent with this purported disclaimer, and notes that the Painters honored the picket line established by the Engineers at the jobsite. The Respondent further contends that there is an agreed-upon method for resolution of the dispute by virtue of the dispute-resolution mechanism of the Employer-Painters collective-bargaining agreements. The Respondent asserts that although it is not a party to these agreements and neither the employer nor the Painters has invoked the dispute resolution mechanism, it expressly assents to participate in and be bound by any proceedings that may be instituted. Alternatively, the Respondent contends that the work should be assigned to it based on the interunion agreement, relative skills, economy, and efficiency, and the employer and area practice.

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Additionally, we find that there exists no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound. Whatever obligations the Internationals or Locals imposed upon themselves through the memorandum of understanding, there is no evidence that the Employer agreed to be bound by this agreement, and the Employer expressly denies any such obligation. With respect to the dispute-resolution clauses of the Employer-Painters collective-bargaining agreements, neither the Employer nor the Painters has instituted proceedings under them and, in any

[2] Castellano testified that the Engineers representative's name was David Acton. The Respondent denies that anyone by that name works for the Engineers, but acknowledges that a David Edwards is an assistant business agent of the Engineers and does not otherwise deny that the above-described conversations occurred.

[3] See, e.g., *Bricklayers & Allied Craftsmen, Local Union No. 2 of California, Bricklayers and Allied Craftsmen, AFL-CIO (E. J. Harris Construction, Inc.)*, 254 NLRB No. 123 (1981); *International Brotherhood of Electrical Workers, Local No. 610 (Landau Outdoor Sign Company, Inc.)*, 225 NLRB 320 (1976).

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2. International Union of Operating Engineers, Local No. 673, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Oliver B. Cannon & Son, Inc., of Florida to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Detemination of Dispute, International Union of Operating Engineers, Local No. 673, shall notify the Regional Director for Region 12, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

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[4] We reject the Employer's request for a broad order applying to this and similar work disputes arising between it and the Respondent. The Respondent's picketing was for a brief period, it subsequently cooperated with the Employer to allow work to continue on the CCA site while the parties submitted their dispute to the Board, and the evidence is insufficient to demonstrate that the Respondent is likely to engage in further unlawful conduct in order to obtain work similar to that in dispute. In these circumstances, we are unable to find that "a broad order is indispensable to the fashioning of a meaningful award here." *International Brotherhood of Electrical Workers, AFL-CIO, Local 104 (Standard Sign & Signal Co., Inc.)*, 248 NLRB 1144, 1148 (1980).